U.S. Department of Justice

Environment and Natural Resources Division

Environmental Enforcement Section
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BSG:AML
DJ No. 90-11-3-1620/2

July 12, 2001

VIA TELECOPY AND REGULAR MAIL

Gary Franke, Esq.
120 E. Fourth St.
Suite 560
Cincinnati, OH 45202

Re: United States v. Aeronca, Inc. et al.
Civil Action No. 1:01 CV 00439
Settlement Demand; Request for Ability-to-Pay Information

Dear Mr. Franke:

Thank you for forwarding the original signature page of the tolling agreement executed on behalf of Clarke, Inc., Clarke Services, Inc., and Richard M. Clarke. As soon as I secure the signature of the appropriate official here at DOJ, I will send you a fully executed copy.

By signing the tolling agreement, your clients avoided being named in a lawsuit that the United States filed on June 29, 2001, in the Southern District of Ohio (Cincinnati). That lawsuit is numbered 1:01 CV 00439. For your files, I have attached a copy of the complaint.

The United States, however, will not forever forestall naming your clients if a settlement cannot be reached. Specifically, the current tolling agreement with your clients expires on August 31, 2001. Barring unforeseen circumstances, the United States does not intend to extend a further invitation to your clients to toll the limitations period. Therefore, barring unforeseen circumstances, if the United States and your clients cannot achieve a settlement between now and the end of August (and by "settlement," I mean a signed Consent Decree, not just an agreement on the dollar figure), the United States intends to amend complaint in the above-referenced action to name the following entities: Clarke, Inc., Clarke Services, Inc., and Richard M. Clarke.

We will assert the following theories of liability against them:

(1) As to Clarke, Inc., we will assert:

(a) direct liability, that is, that Clarke, Inc. itself transported hazardous substances to the Skinner Site; and

(b) successor liability, that is, that Clarke, Inc. is the successor corporation to the sole proprietorship that Richard M. Clarke operated under the name of Dick Clarke Co., and Richard M. Clarke d/b/a Dick Clarke Co. transported hazardous substances to the Site;

(2) As to Clarke Services Inc., we will assert direct liability for the transportation of hazardous substances to the Site;

(3) As to Richard M. Clarke as an individual, we will assert:

(a) direct liability, as the sole proprietor who owned and operated the unincorporated entity named Dick Clarke Co.; and

(b) liability as a shareholder distributee of proceeds from a 1984 sale of the assets of Clarke Services, Inc. to Browning-Ferris Industries of Ohio, Inc.

We urge your clients to recognize that the time for making serious settlement efforts has come. At the end of August, the United States plans to lodge a Consent Decree that will embody the settlements that we have reached to date (two of them) and any settlements that we will reach between now and then (we expect additional settlements). If your clients are not signatories to that Consent Decree, litigation against them will be initiated barring unforeseen circumstances.

At this time, we hope your clients give serious consideration to the major risk facing them if this matter is not settled: the risk of joint and several liability for the United States' $4.3 million in outstanding costs. We believe that your clients may have the view that they have no liability for disposing of construction debris. However, caselaw and expert analysis supports our contention that your clients do have liability for such disposal. Additionally, we note that in an early conference with Judge Weber in the private contribution case, Judge Weber indicated that if any PRP "deposited one empty lead paint can on this site [it] possibly could be responsible for the entire 14 million" dollar remedy. Transcript of Proceedings before the Honorable Herman J. Weber, C-1-97-307, at 10 (S.D. Ohio, August 15, 1997). At least one other PRP settled this matter despite having transported only construction debris. Finally, we believe that at least some of your clients transported more than mere construction debris.

At this point, we renew our request, first made last year and renewed in the recent 104(e) request, that your clients provide us with those portions of the ADR allocator's report applicable to them. The case management order mandating the confidentiality of information developed during the ADR process does not apply to information regarding the person to whom a request for such information is directed. All other non-settlers, except for the entities controlled by Marty Clarke, provided us with their ADR information. If your clients continue to decline to provide it, we will, of course, request it through appropriate processes in the litigation. We have difficulty believing that Judge Weber will consider the material non-discoverable. We also have difficulty believing that Judge Weber will make us "reinvent the wheel" through protracted

discovery of material already generated. Thus, we ask you to provide us with this information by no later than Wednesday, July 25, 2001.

We are aware that, in the private contribution suit, a settlement demand of $616,804 was made against the entities controlled by Dick Clarke. The United States is compelled to increase that demand to reflect that fact that since that demand, EPA's indirect cost methodology has changed.[1] EPA's change in its indirect cost methodology was widely publicized last year, and all PRPs were put on notice that a failure to settle pending actions by October of 2000 could result in the allocation of additional indirect costs at all sites. In this case, we have estimated that the increased costs – that is, the costs that are not reflected in the $4.3 million mentioned above – are at least $500,000.

For purposes of determining our settlement demand against your client, we have calculated that $616,804 represents approximately 14.3% of our total outstanding costs (i.e., of $4.3 million). Because we estimate that our increased indirect costs on this Site are at least $500,000, we have assigned your clients 14.3% of this additional $500,000, or $71,500. Thus, our demand is $688,304 ($616,804 plus $71,500).

We request that your clients to respond to this demand by no later than Wednesday, July 25, 2001.

Finally, in this matter, almost all non-settling parties now are claiming that they lack an ability to pay the amount that we have demanded of them. We take these "ability to pay" claims seriously and we have an established procedure for determining limitations on the ability to pay of any defendant or prospective defendant. Specifically, a corporate financial analyst in the antitrust division of the Department of Justice reviews the financial condition of party asserting an "inability to pay" or a "limited ability to pay." This analyst evaluates financial information that the party asserting the "ability to pay" claim must provide to us. Often times, direct conversations between the analyst and the party asserting the claim occur.

If the three of your clients wish to assert that they collectively have a limited ability to pay the $688,304 demand that the United States has made, they must provide, as a starting point, the following documents:

(1) The last five years of tax returns and financial statements of Clarke, Inc.;

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[1] If the United States reaches a settlement with your clients, we will split the proceeds with the relevant parties in the private contribution action. Thus, your client should not consider the demand made by the United States in this letter as being "in addition to" the demand previously made in the private contribution action. Any settlement of this matter will be "global": the relevant private contribution parties will have to agree to the settlement amount and will have to release your clients from liability and dismiss the action currently pending against your clients.

(2) An "interim" financial statement for Clarke, Inc. that covers the time period between the date of the last financial statement and June 30, 2001;

(3) The last five years of tax returns that Clarke Services, Inc. filed and the last five years of financial statements that were prepared for Clarke Services, Inc. (we recognize these documents may be somewhat old by now);

(4) The last five years of the individual tax returns of Richard M. Clarke.

The documents will be held in confidence. They will serve as the starting point for the ability-to-pay analysis. Once the analyst has had the opportunity to review these documents, he very likely will request further "follow up" information.

Please note that if your clients have the resources to pay some, but not all, of the amount demanded by the United States, they need to provide the financial information set forth above. We do not wish to place any corporation or person in bankruptcy through our demands.

If your clients wish to assert a claim that they have a limited ability to pay the settlement demand, please provide the above-referenced documents by no later than Wednesday, July 25, 2001. If your clients are unable to provide all of the requested documents by that date, please advise me as soon as possible about what they can provide and when they can provide it. **IF I DO NOT RECEIVE THE ABOVE-REFERENCED DOCUMENTS BY JULY 25, 2001, AND THERE HAS BEEN NO COMMUNICATION BETWEEN YOU AND ME REGARDING EXTENDING THAT DATE, THE UNITED STATES WILL ASSUME THAT YOUR CLIENTS HAVE THE ABILITY TO PAY THE FULL DEMAND OF THE UNITED STATES.**

If you wish to speak to me about any of the matters raised herein, I am available tomorrow and every day next week except Thursday, July 19, 2001. In fact, I would like to receive a call from you regarding the matters raised herein after you have had the chance to speak with your clients.

Thank you for your prompt attention to this matter.

Sincerely,

Annette M. Lang
Trial Attorney

cc: Craig Melodia (via fax)